

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

ROBERT W. GALLIART

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Vet.App. No. 15-2887

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (BVA or Board) April 9, 2015, decision, which denied entitlement to a total disability rating based on individual unemployability (TDIU) due to service connected disabilities, which Appellant has not demonstrated is clearly erroneous.

II. STATEMENT OF CASE

Appellant appeals the Board's April 9, 2015, decision denying entitlement to TDIU due to service connected disabilities. [Record (R.) at 2-11]. Because Appellant has not demonstrated that the Board's decision is

clearly erroneous or the product of prejudicial error, the Court should affirm it.

Appellant served on active duty from February 22, 1984 through February 21, 1988. [R. at 225]. Appellant is currently in receipt of a 70 percent total combined rating disability evaluation, to include a 40 percent evaluation for lumbar spine disc disease with degenerative changes (low back condition), a 20 percent evaluation each for a right lower extremity radiculopathy and left lower extremity radiculopathy (radiculopathy), a 10 percent evaluation for tinnitus, a 10 percent evaluation for a left knee strain and a noncompensable evaluation for a left knee laxity condition. [R. at 58-60 (54-61)].

Appellant underwent a VA back (thoracolumbar spine) conditions exam in August 2012 in response to his claim for an increased rating. [R. at 195, 159-172]. The August 2012 Department of Veterans Affairs (VA) examiner described less movement than normal and pain on movement as contributing to functional loss or impairment, but not to the extent that it impacted Appellant's ability to work. [R. at 163, 172 (159-172)]. The August 2012 VA examiner remarked that Appellant has received Social Security disability and has been unemployed since 2001, but "not secondary to his lumbar spine condition." [R. at 172 (159-172)]. Appellant filed an application for increased compensation based upon unemployability in September 2012 asserting that his service connected conditions prevent him from obtaining and maintaining employment. [R. at 137-140].

In October 2012, Appellant notified VA that he had been receiving Social Security Disability Benefits since October 2002. [R. at 70-73]; see [R. at 106]. The VA Regional Office (RO) attempted to obtain the records identified by Appellant from the Social Security Administration (SSA), but received a negative response in November 2012. [R. at 63]. After the RO made a formal finding of unavailability and notified Appellant by telephone and letter, he stated in December 2012 that he would forward the SSA records in his possession to the RO. [R. at 63, 65, 68, 83-84]. Those records were not received. [R. at 64-65].

At a November 14, 2012 VA examination, the same VA examiner who conducted the August 2012 examination, addressed the impact of all of Appellant's service-connected disabilities, to include a left knee condition, low back condition, radiculopathy, and tinnitus, on his ability to obtain and maintain substantially gainful employment. [R. at 91-103]. The examiner explained that the low back and left knee disabilities would likely prevent physically demanding work such as construction because such work would aggravate these conditions. [R. at 103 (91-103)]. The examiner also explained that Appellant's tinnitus would not be affected by physical or sedentary work and that the left knee condition, low back condition, and radiculopathy would not be aggravated by sedentary work that did not demand excessive ambulation or filing. [R. at 103 (91-103)].

In a March 2013 rating decision, the RO denied entitlement to TDIU. [R. at 60 (54-61)]. Appellant filed Notice of Disagreement in March 2013 and his

VA Form 9 in May 2013. [R. at 21, 46]. Appellant filed his VA Form 9 in May 2013 asserting entitlement to TDIU. [R. at 21]. In an April 9, 2015, decision, the Board denied entitlement to TDIU due to service connected disabilities. [R. at 3-11]. This appeal followed.

III. ARGUMENT

The Court should affirm the Board's decision that denied entitlement to extraschedular consideration because the Board's decision is plausibly based upon the evidence of record and is not clearly erroneous. *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990). Appellant has not demonstrated that the Board committed prejudicial error that would warrant any action by the Court other than affirmance. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination).

A TDIU rating may be assigned to a veteran who meets certain disability percentage thresholds and is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16(a). *Dalton v. Nicholson*, 21 Vet.App. 23, 33 (2007). To determine whether TDIU should be allowed, the record must show that the circumstances surrounding a Veteran who is unemployable due to service-connected disabilities are different than those surrounding other Veterans with the same disability rating. *Van Hoose v. Brown*, 4 Vet.App. 361, 363 (1993). Without "evidence or even an

avermment of unusual or exceptional circumstances” indicating an inability to perform the physical and mental acts required by employment, to the extent not otherwise contemplated by the disability rating, TDIU is not appropriate. *Id.* The Court reviews the Board’s determination of whether a Veteran unable to secure or follow substantially gainful employment under the deferential clearly erroneous standard of review. *Pederson v. McDonald*, 27 Vet. App. 276, 286 (2015), *amended*, No. 13-1853, 2015 WL 674734 (Vet. App. Feb. 18, 2015). Appellant fails to carry his burden of persuasion that his service-connected disabilities, either individually or collectively, cause him to be unemployable. *See Sanders, supra.*

The first issue as posed by Appellant for the first time in his principal brief is whether the Board failed in its duty to assist in gathering his Social Security Administration (SSA) “award data.” Appellant’s Brief (AB) at 2. The Board found that the RO attempted to obtain the SSA records identified by Appellant, but received a response by the SSA the records do not exist and the Appellant had failed to forward his SSA records. [R. at 5 (3-11)]. The Board found that the duty to assist had been fulfilled, which Appellant has not demonstrated is clearly erroneous. [R. at 5 (3-11)]. *See Golz v. Shinseki*, 590 F.3d 1317, 1322 (Fed.Cir.2010) (The Court reviews the Board’s determination of whether the duty to assist has been satisfied under the deferential clearly erroneous standard of review).

VA's duty to assist includes making "reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit," which includes, pertinent to this case, "relevant records held by a Federal department or agency that the claimant adequately identifies and authorizes the Secretary to obtain." 38 U.S.C. § 5103A(a)(1), (c)(3). VA is not required to assist a claimant in obtaining identified records "if no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); see *Golz v. Shinseki*, 590 F.3d 1317, 1320-21 (Fed.Cir.2010) (The duty to assist is not boundless in its scope and only relevant SSA records must be sought.). "Relevant records for the purpose of [section] 5103A are those records that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim." *Golz v. Shinseki*, 590 F.3d 1317, 1320-21 (Fed. Cir. 2010).

Under 38 C.F.R. § 3.159(c)(2), VA is required to make as many requests as necessary to obtain records from other Federal agencies. VA may discontinue its efforts to obtain relevant records from a Federal department or agency only when it concludes that continued efforts would be futile, and it may deem further efforts futile when the Federal department or agency advises it that either the requested documents do not exist or that the custodian does not have them. 38 C.F.R. § 3.159(c)(2). The Secretary must comply with specific notice requirements when he determines that he is unable to obtain identified

records. The Secretary must send the veteran notice identifying the records VA was unable to obtain; explaining the efforts VA made to obtain those documents; and describing any further action VA will take with respect to the claim. 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.159(e).

The evidence contains a plausible basis for the Board's determination that SSA records did not exist. In October 2012, Appellant notified VA that he had been receiving Social Security Disability Benefits since October 2002. [R. at 106]. On November 19, 2012, the RO submitted a SSA disability records request to the SSA. [R. at 82]. In a November 20, 2012 letter, the RO notified Appellant that VA was attempting to collect his SSA records on his behalf. [R. at 83-84]. The SSA National Records Center informed the RO on November 27, 2012, that,

We cannot send the medical records you requested. Such records do not exist; further efforts to obtain them will be futile. There are no medical records. The person did not file for disability benefits. OR, the person filed for disability benefits but no medical records were obtained.

[R. at 70]. The RO telephoned Appellant on December 7, 2012, to inform him the SSA determined that such records do not exist. [R. at 68]. Appellant responded that he keeps everything and would look for and forward [SSA] records at his earliest convenience." [R. at 68]. By February 6, 2013, Appellant had not submitted his Social Security records and the RO made an unsuccessful attempt to contact Appellant by telephone. [R. at 65]. That same day, the RO sent a

letter to Appellant advising him of the SSA's response to the request for his records, the requirement that he submit any relevant documents in his possession, and that a decision will be made based upon the available evidence if not received within ten days. [R. at 64]. In late February 2013, the RO made a formal finding of unavailability of records. [R. at 63]. No pertinent evidence was received from Appellant. [R. at 63]. Subsequently, the RO issued the February 28, 2013, rating decision denying TDIU. [R. at 60 (54-61)].

The evidence makes clear that the RO received an unequivocal response from the Social Security Administration that Appellant's "medical records" do not exist. The RO advised Appellant of the unavailability of the SSA records and requested that he provide copies of those records in his possession, which Appellant agreed to do, but failed to follow through on. See *Wood v. Derwinski*, 1 Vet.App. 413, 417 (1991) ("The duty to assist is not always a one-way street. If a [V]eteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence.") The Board found that VA made reasonable efforts to assist in obtaining all relevant SSA records and the record indicates VA fulfilled its obligation to provide Appellant with the notice required in § 3.159(e).

Appellant baldly asserts that SSA's finding that his medical records do not exist does not extend to a SSA award decision, which he failed to provide to VA upon request. AB at 3. Appellant has also not offered a specific allegation

or indication that any such SSA records are relevant to any of his service-connected disabilities, such that they may help substantiate his claim. See *Golz*, 590 F.3d at 1323 (“When a[n] SSA decision pertains to a completely unrelated medical condition and the veteran makes no specific allegations that would give rise to a reasonable belief that the medical records may nonetheless pertain to the injury for which the veteran seeks benefits, relevance is not established.” (emphasis added)).

Moreover, Appellant was represented by counsel below and failed to make this argument earlier. [R. at 222]. When an issue is not raised below, it may result in that issue not being heard by the Court, and this is particularly so when an appellant was represented by counsel below. See *Maggitt v. West*, 202 F.3d 1370, 1377-78 (Fed. Cir. 2000); see also *Andrews v. Nicholson*, 421 F.3d 1278, 1282 (Fed. Cir. 2005) (pro se pleadings, not those of counsel, are entitled to sympathetic reading below). Interests of judicial economy demand that a represented Veteran present all theories and assignments of error to VA before appealing to this Court. *Massie v. Shinseki*, 25 Vet. App. 123, 128 (2011), *aff'd*, 724 F.3d 1325 (Fed. Cir. 2013).

Appellant argues that the Board failed “to address Appellant’s level of education, . . . special training, and . . . previous work experience.”. AB at 3-4. This is false. Indeed, the Board considered that Appellant last worked from September 2010 to October 2010 and from July 2011 to August 2011 at

Walmart and that Appellant's last full-time job was in 2001 as a construction supervisor. [R. at 7 (2-13)]. The Board also acknowledged that Appellant's education and training was limited to a high school education. [R. at 7 (2-13)]. The Board found that Appellant is physically able to perform sedentary work that is consistent with his education and occupational experiences. [R. at 8 (2-13)].

To the extent that Appellant argues the Board failed to address flare-ups that impacted sitting or standing greater than ten minutes as reported by Appellant at the August 2012 VA examination, the examiner found no functional loss of the thoracolumbar spine. [R. at 160, 162 (159-172)]. AB at 9. Whether the Veteran can actually find employment is not determinative, as the focus of the inquiry is on "whether the veteran is *capable* of performing the physical and mental acts required by employment." *Van Hoose*, 4 Vet.App. at 363 (emphasis in original).

Appellant argues that the Board relied upon inadequate August 2012 and November 2012 VA examinations. AB at 7-9. An examination report is adequate when it is based on the appellant's history and sufficiently informs the Board of a medical expert's judgment on a medical question and the essential rationale for that opinion. *Monzingo v. Shinseki*, 26 Vet.App. 97, 105-06 (2012). The requirement that examiners provide an adequate report for a rating decision does not require that they "offer opinions on the general employability

of a claimant.” *Moore v. Nicholson*, 21 Vet.App. 211, 219 (2007), *rev’d on other grounds Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). Rather, it is the job of the rating specialist to determine “how . . . disabilities translate into” compensation. *Id.* at 218; see *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) (“[A]pplicable regulations place responsibility for the ultimate TDIU determination on the VA, not a medical examiner.”). The law does not impose any reasons-or-bases requirements on medical examiners and the adequacy of medical reports must be based upon a reading of the report as a whole. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012). Whether a medical opinion is adequate is a finding of fact subject to judicial review under the deferential clearly erroneous standard. *D’Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

What is required of an examiner by *Monzingo* is precisely what the August 2012 VA back examiner did here. The August 2012 examiner diagnosed degenerative disc disease of the lumbar spine and took Appellant’s medical history in which he complained of daily stiffness and pain and bilateral radiculopathy. [R. at 159-160 (159-172)]. The August 2012 examiner performed clinical testing to determine Appellant’s range of motion and found less movement than normal and pain on movement as contributing to functional loss or impairment, but not to the extent that it impacted Appellant’s ability to work. [R. at 161-163, 172 (159-172)]. The August 2012 VA examiner remarked that Appellant has received Social Security disability and has been unemployed since

2001, but “not secondary to his lumbar spine condition.” [R. at 172 (159-172)]. To the extent that Appellant takes issue with the August 2012 examiner’s remark that Appellant has not been unemployed “secondary to” or due to his low back condition, he has not explained how that remark is inconsistent with the examiner’s conclusion that the low back disorder does not impact his ability to work. [R. at 172 (159-172)]. AB at 8. *See Sanders, supra*.

After Appellant filed an application for increased compensation based upon unemployability in September 2012, Appellant underwent a November 14, 2014, examination to assess whether his service connected disabilities render him incapable of obtaining and continuing substantially gainful employment. [R. at 108-110, 120, 137-140]. Appellant argues the “November 7, 2012” examination is inadequate because the examiner failed to discuss his education and work history and how his education and work history affects his ability to obtain and maintain substantially gainful employment. AB at 8. Although it is not clear whether Appellant is referring to the November 14, 2012, VA examination or the August 8, 2012, VA examination, his argument should be rejected. Although employability determinations are based on a Veteran's service-connected disabilities, employability is not purely a medical question. 38 C.F.R. § 4.16. In determining whether a veteran is unemployable, the *adjudicator* must consider certain nonmedical facts that fall outside a medical professional's medical expertise, such as the poverty line and the veteran's educational and occupational

history. See 38 C.F.R. § 4.16(a); see also, *Beaty v. Brown*, 6 Vet.App. 532, 537, 538 (1994) (distinguishing between educational or occupational history and medical evidence). In contrast, the role of medical expertise is limited to providing a “description of the effects of disability upon the person's ordinary activity.” *Floore v. Shinseki*, 26 Vet.App. 376, 381 (2013). The VA examiner was not required to discuss Appellant's work history and education as part of an opinion discussing the functional effects of the appellant's disability. See *Acevedo v. Shinseki*, *supra*. Rather, it is the responsibility of the rating specialist to perform such an analysis, which was done in this case. [R. at 8]; see *Geib*, *supra*.

Appellant argues that the November 2012 VA examination is inadequate because the examiner stated the Appellant's tinnitus would not be affected by physical or sedentary work without the benefit an audiology examination or “clinical review”. AB at 9. Appellant offers no authority why the 2012 VA examination is inadequate when the examiner wasn't asked to opine on the degree of tinnitus, but on whether Appellant's service connected disabilities, individually or in combination, render him unable to secure and maintain substantially gainful employment. [R. at 109]. See *Monzingo*, 26 Vet.App. at 107 (“Here, Mr. Monzingo has not demonstrated, as is his burden, that the February 2008 VA examination report was so lacking in detail as to require VA to return it for clarification.”). The 2012 VA examiner, who reviewed Appellant's claim file, which includes medical records pertaining to tinnitus, clearly found

that Appellant's service-connected tinnitus would not be affected by physical or sedentary work. [R. at 103 (91-103)]. See *Monzingo*, 26 Vet.App. at 106 (although a veteran may disagree with a medical expert's opinion, he has not demonstrated his competence to rebut it).

Finally, Appellant argues both that the Court should reverse and remand" the Board's decision. AB at cover page. Assuming Appellant is arguing for reversal as opposed to remand, remand is the appropriate remedy where the Board has incorrectly applied the law or failed to provide an adequate statement of reasons or bases for its determinations. See *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004). Reversal is only appropriate when the Board's decision is clearly erroneous because the "only permissible view of the evidence is contrary to the Board's decision." *Coburn v. Nicholson*, 19 Vet.App. 427, 430 (2006). Appellant fails to demonstrate that the VA failed in its duty to assist in obtaining SSA records, that the Board's reasons or bases was inadequate, or that the August and November 2012 VA examinations were inadequate and that the Board erred upon relying on them. Even presuming his argument had merit, which is not conceded, vacatur and remand, rather than reversal, would be the appropriate remedy. See *Coburn, supra.*; *Gutierrez, supra.* However, because Appellant fails to demonstrate error, let alone resulting prejudice, the Court should affirm the Board's decision. *Sanders*, 556 U.S. 396 at 409.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

IV. CONCLUSION

Wherefore, for the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully urges the Court to affirm the Board's April 9, 2015, decision denying entitlement to TDIU due to service connected disabilities.

Respectfully submitted,

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